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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 IN RE: INCRETIN MIMETICS  
12 PRODUCTS LIABILITY  
13 LITIGATION

} MDL Case No.13md2452 AJB (MDD)

} As to all related and member cases

} ORDER GRANTING JOINT  
14 } MOTION FOR ENTRY OF ORDER  
15 } REGARDING DEPOSITION  
16 } PROTOCOL

} [Doc. No. 526]  
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19 This Order applies to all cases in this MDL, and to all counsel and law firms that have  
20 appeared in this MDL. In any deposition that is cross-noticed between this MDL and any  
21 other jurisdiction, counsel and law firms that have appeared in this MDL, shall be bound by  
22 this Order throughout the deposition.

23 **I. GENERAL PROVISIONS**

24 **A. Lead Deposition Counsel**

25 Depositions and matters related to depositions shall be coordinated by a Lead  
26 Deposition Counsel for plaintiffs and Lead Deposition Counsel for defendants. Lead  
27 Deposition Counsel for plaintiffs shall be Michael Johnson or his designee.

28 Lead Deposition Counsel for defendants shall be Richard Goetz or his designee for

1 Amylin Pharmaceuticals, LLC (“Amylin”), Nina Gussack or her designee for Eli Lilly and  
2 Company (“Lilly”), Doug Marvin or his designee for Merck Sharp & Dohme Corp.  
3 (“Merck”), and Loren Brown or his designee for Novo Nordisk, Inc. (“Novo”). The name  
4 and contact information for any designee shall be promptly communicated to the other  
5 parties in writing.

6 **B. Deposition Notices**

7 **1. *Notice of Deposition Procedures.*** A copy of this Order shall be attached  
8 to each non-party subpoena issued or served in these MDL proceedings.

9 **2. *Contents of Notice.*** All deposition notices shall comply with the  
10 requirements of Fed. R. Civ. P. 30(b), and where cross-noticed the rules of that  
11 jurisdiction.

12 **C. Cooperation**

13 Counsel are expected to cooperate with and be courteous to each other and deponents  
14 in both scheduling and conducting depositions.

15 **D. Attendance**

16 **1. *Who May Be Present.*** Unless otherwise ordered under Fed. R. Civ.  
17 P.26(c) and subject to the terms of the Protective Order, depositions may be attended by  
18 counsel of record, members and employees of their firms, attorneys specially engaged by  
19 a party for purposes of the deposition, the parties or the representative of a party, court  
20 reporters, videographers, the deponent, and counsel for the deponent. Under no circum-  
21 stances shall a person attend the deposition in any manner remotely without being identified,  
22 this shall include by telephone, internet link-up of any kind or remote access communica-  
23 tion.

24 **2. *Unnecessary Attendance.*** Unnecessary attendance by counsel is  
25 discouraged. Counsel who have only marginal interest in a proposed deposition or who  
26 expect their interests to be adequately represented by other counsel should elect not to  
27 attend. No attorney who attends, participates in or uses a deposition in these proceedings  
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1 shall be entitled or subject to any assessment, fee or tax merely by reason of such  
2 attendance, participation or use.

3           **3.     *Notice of Intent to Attend a Deposition.*** In order for counsel to make  
4 arrangements for adequate deposition space, counsel who intends to attend a deposition  
5 noticed in this MDL should advise Lead Deposition Counsel for plaintiffs and defendants  
6 not fewer than three (3) business days prior to the deposition, whenever feasible. The  
7 notification should include the names of all attendees appearing at the deposition.  
8

## 9 **II.     CONDUCT OF DEPOSITIONS**

### 10 **A.     Examination**

11           Questioning should ordinarily be conducted by no more than two attorneys for all  
12 plaintiffs. Once the witness has fully answered a question, that same question or  
13 substantially the same question shall not be asked again. Three (3) business days before the  
14 date of the deposition Lead Deposition Counsel for the noticing party shall give Lead  
15 Deposition Counsel for the other side notice of the identity of the lead attorney(s) who will  
16 examine the deponent.

17           Counsel should cooperate in the allocation of time in order to comply with the time  
18 limits set by the Court.

19           **1.     *Production of Documents.*** Third-party witnesses subpoenaed to produce  
20 documents shall, to the extent possible, be served with the document subpoena at least  
21 fifteen (15) calendar days before a scheduled deposition. Depending upon the quantity of  
22 documents to be produced, some time may be needed for inspection of the documents before  
23 the examination commences.

24           **2.     *Copies.*** Extra copies of documents about which deposing counsel  
25 expects to examine a deponent should be provided to primary counsel for the parties and the  
26 deponent during the course of the deposition.

27           **3.     *Objections to Documents.*** Objections to the relevance or admissibility  
28 of documents used as deposition exhibits are not waived, and are preserved for later ruling

1 by the Court or by the trial judge. All parties shall cooperate as necessary so that the Court  
2 may issue a ruling on any objection to a document prior to trial or prior to any remand of  
3 cases for trial in the transferor courts.

4 **B. Duration**

5 Counsel should consult prior to a deposition to agree upon the time required to depose  
6 a particular witness. Counsel are encouraged to limit the length of depositions wherever  
7 practicable to no more than seven (7) hours, as provided by Rule 30 (d)(1) of the Federal  
8 Rules of Civil Procedure and pursuant to Magistrate Dembin's ruling dated January 7 2014  
9 (Document 250). In the event either party anticipates any deposition to exceed seven (7)  
10 hours, such party shall notify opposing counsel no less than fifteen days (15) prior to the  
11 deposition absent a good-faith basis for a shorter period of notice. If the parties cannot  
12 agree, the Court will decide on a deposition-by-deposition basis whether additional time is  
13 needed. The parties may expect that rather than rule prospectively, the Court may permit the  
14 deposition to go forward and decide after-the-fact whether additional time is needed. In that  
15 way, the Court can determine whether the questioning was properly focused by the party  
16 taking the deposition and whether the party defending the deposition caused unnecessary  
17 delay during the deposition.  
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19 **C. Deposition Day**

20 Subject to the time limits set forth above, it is anticipated that a deposition day  
21 typically shall commence at 9:00 a.m. and last typically no more than eight and one-half  
22 (8.5) hours, including lunch and breaks. There shall be one fifteen (15) minute morning  
23 break and two fifteen (15) minute afternoon breaks, with one (1) hour for lunch. Variations  
24 in this schedule may be made by agreement of counsel who noticed the deposition and  
25 counsel for the deponent. Nothing herein shall prevent a witness from requesting a break at  
26 any time except while a question is pending, nor prevent any counsel from requesting a short  
27 break for personal reasons.  
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1           **D.     Scheduling**

2           Absent extraordinary circumstances, counsel should consult in advance with opposing  
3 counsel and counsel for proposed deponents in an effort to schedule depositions at mutually  
4 convenient times and locations. Counsel are expected to cooperate and coordinate the  
5 scheduling of depositions. After counsel have arrived on a mutually acceptable date and  
6 location for a deposition, each side, including other defendants, shall be notified of the  
7 scheduled deposition at least ten (10) days in advance.  
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9           **E.     Location for Depositions**

10           1.     Unless otherwise agreed, depositions of plaintiffs will take place in each  
11 plaintiff's home district.

12           2.     Unless otherwise agreed by the parties prior to the noticing of an expert  
13 deposition, the deposition of an expert witness shall take place in the expert witness' home  
14 district.

15           3.     To the extent reasonably possible, depositions of current and former  
16 employees of each defendant shall take place as determined by each defendant.

17           **F.     Coordination with State and Federal Court Actions, Cross Noticing and**  
18           **Avoidance of Duplicative Depositions**

19           1.     *Coordination with State and Federal Court Actions.* In order to avoid  
20 duplicative discovery, minimize the number of times that a witness shall appear for a  
21 deposition, and to prevent the unnecessary expenditure of judicial resources and the  
22 resources of parties, counsel for plaintiffs in the MDL shall use their best efforts to  
23 coordinate the scheduling of depositions with counsel for state and federal court plaintiffs.  
24 In a coordinated deposition, this Court expects counsel for plaintiffs in the MDL and  
25 counsel for state and federal court plaintiffs to cooperate in selecting the primary examiners  
26 described in section II.A., above. Regardless of which counsel conducts the initial  
27 examination of the deponent, subsequent questioning shall not be redundant or repetitive,  
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1 although clarification of prior testimony may be sought if reasonably calculated to elicit  
2 testimony that adds to the substance of prior testimony.

3           **2. Cross-Noticing.** Any deposition in this MDL may be cross-noticed by  
4 any party in any Byetta, Januvia, Janumet, or Victoza-related action pending in state or  
5 federal court, and any deposition in any Byetta, Januvia, Janumet, or Victoza -related action  
6 pending in state or federal court may be cross-noticed by any party in this MDL. Each  
7 deposition notice shall include the information described in section I.B.2., supra. If a state  
8 or federal court deposition has been cross-noticed in this MDL, then state or federal court  
9 plaintiffs represented by counsel with actions filed in this MDL may not take a subsequent  
10 deposition of that witness except for good cause shown as determined by Magistrate Judge  
11 Dembin and, in that case, any subsequent deposition shall be restricted to such additional  
12 inquiry permitted by Magistrate Judge Dembin.

13           **3. Depositions Taken in Other Proceedings** Defendants shall advise  
14 plaintiffs' Lead Deposition Counsel of all depositions that have been taken by plaintiffs in  
15 other Byetta-related proceedings (other than depositions of case-specific witnesses) and  
16 shall assist in arranging for the plaintiffs' Lead Deposition Counsel to obtain copies of  
17 transcripts of those depositions. If counsel for plaintiffs in this MDL proceeding, re-notices  
18 the depositions of witnesses who already have been deposed in related litigation, counsel  
19 for defendants may object on the grounds that the witness previously was deposed in  
20 related litigation. Such objection must be made within ten (10) days of the notice and Lead  
21 Deposition Counsel shall meet and confer within five (5) days of the objection to attempt  
22 to resolve the dispute. If no agreement can be reached, the matter shall be brought to  
23 Magistrate Judge Dembin for resolution at the earliest possible time and without undue  
24 delay to avoid postponement of the deposition. In bringing the matter to Magistrate Judge  
25 Dembin, Plaintiffs shall identify the areas for questioning of the witness and, to the extent  
26 that these areas previously were covered, provide good cause for the re-examination.  
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1 Defendants shall specifically respond to the good cause proffered by plaintiffs.

2 **4. Successive Depositions in this Proceeding.**

3 The parties should endeavor to have a deponent appear for deposition just one time,  
4 even if the deponent is both a fact witness and a corporate designee. A party who elects  
5 to produce a witness pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and  
6 also as a fact witness shall provide written notice of that intention, within 5 days of service  
7 of the Notice of Deposition. The parties will comply with the requirement in the applicable  
8 Procedures for Production of Electronically Stored Information that they will notify  
9 opposing counsel when their production of a custodial file is substantially complete. Where  
10 the parties cannot agree on a single deposition of a deponent who is both a corporate  
11 designee and a fact witness, the dispute shall be submitted promptly to Magistrate Judge  
12 Dembin for resolution in advance of the scheduled deposition. The burden will be on the  
13 plaintiffs to demonstrate that a single deposition of the witness is not appropriate.  
14

15 **G. Early Depositions**

16 Subject to any other order regarding *in extremis situations* if the parties become  
17 aware of persons who possess relevant information but who by reason of age or ill health  
18 may become unavailable for deposition, the deposition may be taken as soon as practicable  
19 in accordance with the terms and conditions agreed-to by the parties or ordered by the  
20 Court.  
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22 **H. Objections and Directions Not to Answer**

23 **1.** Counsel shall comply with the FRCP and Local Rules of the Southern  
24 District of California. Any objection by a party at a deposition shall be deemed to have  
25 been made on behalf of all other parties. All objections, except those as to form and  
26 privilege, are reserved until trial or other use of the depositions.  
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1                   2.       Counsel shall refrain from engaging in colloquy during deposition. The  
2 phrase “objection as to form” or similar language in accordance with applicable law shall  
3 be sufficient to preserve all objections as to form until the deposition is sought to be used.  
4 If requested, the objecting party shall provide a sufficient explanation for the objection to  
5 allow the deposing party to rephrase the question. For depositions cross-noticed with any  
6 state-court proceeding, nothing in this paragraph prohibits counsel for parties to the state-  
7 court proceeding from specifying the bases for objections to the form of questions if and  
8 to the extent required under the relevant state’s law. No speaking objections are allowed  
9 and professionalism is to be maintained by all counsel at all times. Counsel shall not make  
10 objections or statements that might suggest an answer to a witness.  
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12                   **I.       Telephonic Depositions and Participation**

13                   By indicating in its notice of deposition that it wishes to conduct the deposition by  
14 telephone, a party shall be deemed to have moved for such an order under Fed. R. Civ. P.  
15 30(b)(4). Unless an objection is filed and served within ten (10) calendar days after such  
16 notice is received, Magistrate Judge Dembin shall be deemed to have granted the motion.  
17 Non-examining counsel may attend depositions telephonically but are not permitted to  
18 participate absent extenuating circumstances, such as weather delay or physical restriction  
19 on travel.

20                   **J.       Disputes During Depositions**

21                   Disputes between the parties should be addressed to this Court rather than the  
22 District Court in the District in which the deposition is being conducted.

23                   Disputes arising during depositions that cannot be resolved by agreement and that,  
24 if not immediately resolved, will significantly disrupt the discovery schedule or require  
25 rescheduling of the deposition, or might result in the need to conduct a supplemental  
26 deposition, shall be presented to Magistrate Judge Dembin by telephone (619-446-3972).  
27 If the Magistrate Judge is not available, or to the extent the parties are still unable to resolve  
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1 the dispute, the deposition shall continue with full reservation of rights for a ruling at the  
2 earliest possible time.

3 If the nature of the dispute would not stop the deposition from going forward, the  
4 parties may elect to either present the matter to Magistrate Judge Dembin by telephone, or  
5 to present the dispute to Magistrate Judge Dembin in writing. Magistrate Judge Dembin  
6 will issue a prompt ruling, as his schedule permits.

7 In the event Magistrate Judge Dembin is unavailable by telephone to resolve disputes  
8 arising during the course of the deposition, the deposition shall nevertheless continue to be  
9 taken as to matters not in dispute. Nothing in this Order shall deny counsel the right to 1)  
10 suspend a deposition pursuant to Fed. R. Civ. P. 30(d)(3); 2) file an appropriate motion  
11 with Magistrate Judge Dembin after the deposition, and appear personally before  
12 Magistrate Judge Dembin, or 3) file a motion to prevent any decision or recommendation  
13 of Magistrate Judge Dembin from taking effect as may be otherwise permitted.

#### 14 **K. Video Depositions**

15 By so indicating in its notice of a deposition, a party, at its expense, may record a  
16 deposition by videotape or digitally-recorded video pursuant to Fed. R. Civ. P. 30(b)(3)  
17 subject to the following rules:

18 **1. Real-time Feed.** All video depositions will be stenographically recorded  
19 by a court reporter with “real-time feed” transcription capabilities if available.

20 **2. Video Operator.** The operator(s) of the video recording equipment shall  
21 be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the  
22 deposition, the operator(s) shall swear or affirm to record the proceedings fairly and  
23 accurately.

24 **3. Attendance.** Each witness, attorney and other person attending the  
25 deposition shall be identified on the record at the commencement of the deposition. Under  
26 no circumstances shall a person attend the deposition in any manner remotely without being  
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1 identified, this shall include by telephone, internet link up of any kind or remote access  
2 communication.

3           **4.     Standards.** Unless physically incapacitated, the deponent and examiner  
4 shall be seated at a table except when reviewing or presenting demonstrative materials for  
5 which a change in position is needed. To the extent practicable, the deposition will be  
6 videotaped against a solid background with only such lighting as is required for accurate  
7 video recording. Lighting, camera angle, lens setting and field of view shall be non-  
8 obtrusive to the deponent, and will be changed only as necessary to record accurately the  
9 natural body movements of the deponent. Only the deponent and any exhibits or  
10 demonstrative aids used in the examination will be video recorded. Sound levels will be  
11 altered only as necessary to record satisfactorily the voices of counsel and the deponent.  
12 The witness shall appear in ordinary business attire (as opposed to, for instance, a lab coat)  
13 and without objects such as a Bible, medical equipment, or other props, except to the extent  
14 that the prop is used as an aide in order to demonstrate and/or explain the witness'  
15 testimony.  
16

17           **5.     Filing.** The operator shall preserve custody of the original video  
18 medium (tape or DVD) in its original condition until further order of the Court.

19           **6.     Interruptions.** No attorney or party shall direct instructions to the video  
20 operator as to the method of operating the equipment. The video camera operation will be  
21 suspended during the deposition only upon stipulation by counsel and "off the record"  
22 discussions.

23           **7.     Other Recording.** No one shall use any form of recording device during  
24 the course of a deposition other than the designated videographer or court reporter. This  
25 shall include any form of remote transmitting device, computer recording device, laptop  
26 cameras or personal data devices including smart phones, tablets, iPads, Androids, iPhones,  
27 Blackberry, or other PDA. Any person caught violating this provision shall be immediately  
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1 identified and reported to the Court for the possible imposition of sanctions. This shall not  
2 preclude the taking and transmission of notes by or to those identified on the record.

3 **L. Correction and Signing Depositions**

4 Unless waived by the deponent, the transcript of a deposition shall be submitted to  
5 the deponent for correction and signature within thirty (30) days after the end of the  
6 deposition. The deposition may be signed by the deponent before any notary within thirty  
7 (30) days after the transcript is submitted to the deponent. If no corrections are made  
8 during this time, the transcript will be presumed accurate.

9 **M. Cost of Deposition**

10 The noticing party shall bear the initial expense of both videotaping and stenographic  
11 recording. The parties shall pay for their own copies of transcripts and videotapes of  
12 depositions.  
13

14 **III. FEDERAL RULES OF CIVIL PROCEDURE APPLICABLE**

15 Unless specifically modified herein, nothing in this order shall be construed to  
16 abrogate the Federal Rules of Civil Procedure or the Local Rules of this Court.  
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20 DATED: July 29, 2014

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23 Hon. Anthony J. Battaglia

24 U.S. District Judge  
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